APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL COLE, Plaintiff-Appellant, v. BUILDERS SQUARE, INC., a Delaware corporation; CUPRUM, S.A. de C.V., Defendants-Appellees.	No. 01-35491 DC No. CV-99-00729-PA MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Senior District Judge, Presiding
Argued and Submitted September 9, 2002
Portland, Oregon
[Filed: October 11, 2002]

Before: GOODWIN, T.G. NELSON, and GRABER, Circuit Judges.

We reverse and remand in part, dismiss in part and affirm

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

in part.

I. Strict Liability Claims

At trial, Cole advanced two theories of strict liability: design defect and failure to warn. The district court granted judgment as a matter of law on Cole's claim of a design defect because it concluded that he had not offered evidence of a safer alternative design. Under then-existent Oregon law, the district court may have been correct. However, after the district court issued its decision, the Oregon Supreme Court rejected the idea that plaintiffs must always offer "evidence that the magnitude of the product's risk outweighs its utility, which often is demonstrated by proving that a safer design alternative was both practicable and feasible."[1] And the Oregon Supreme Court suggested that even in cases in which a jury requires evidence in order to determine the ordinary consumer's expectations, evidence other than proof that "a safer design alternative was both practicable and feasible" may suffice.[2] In light of recent precedent, we reverse and remand on this issue.

Defendant also argues that its product is not defective as a matter of law because the ladder comes with adequate warnings and instructions. Specifically, the ladder has a warning that states that all directions must be followed and one of the

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[1] *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 23 P.3d 320, 331 (Or. 2001).

[2] *Id.* (stating that evidence of ordinary consumer expectations "*may* consist" of risk-utility analysis, "which often is demonstrated by proving that a safer design alternative was both practicable and feasible") (emphasis added). We do not decide whether the matter in this case was outside the realm of jurors' common experience such that additional evidence was necessary. We simply point out that, even if this matter is outside the realm of jurors' common experience, proof of a safer design alternative may not be necessary under current Oregon law.

directions instructs the reader to "securely engage ladder locks before climbing." Defendant reasons as follows: (1) Under Oregon law, a product that carries a warning that, if followed, allows it to be used safely is not defectively designed; (2) Defendant's ladder is safe if the warnings (and instructions) are followed; and, (3) therefore, the warnings render the ladder nondefective.

We reject Defendant's argument because the warnings do not address the problem about which the plaintiff complains: the appearance that the rungs are locked when they are not. A user, knowing full well that the rung locks must be securely engaged before use and attempting to ensure that they are, will not know from the warnings or the instructions on the ladder that the rung locks may appear to be locked when they are not. Thus the user will not know that more than a simple, visual inspection is necessary to ensure that the rung locks are securely engaged. The current labels and instructions thus do not necessarily satisfy the duty to warn.[3] Accordingly, we conclude that the district court erred when it granted judgment as a matter of law on this issue.

For the foregoing reasons, we reverse and remand Cole's claims of a design defect and a failure to warn.

II. Punitive Damages Claim

We affirm the district court's grant of summary judgment as to Cole's punitive damages claim. Federal law applies to the "question of the quantum of proof necessary to sustain a cause

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[3] *Cf. Schmeiser v. Trus Joist Corp.*, 273 Or. 120, 540 P.2d 998, 1005 (Or. 1975) (explaining that instructions "which merely tell how to use the product, and which do not say anything about the danger of foreseeable misuse, do not necessarily satisfy the duty to warn") (internal quotation marks and citation omitted).

of action."[4] The federal standard requires the court to "view the evidence presented through the prism of the substantive evidentiary burden,"[5] which is precisely what the district court did. Because we conclude that the district court properly applied the relevant standard, we affirm on this issue.

III. Evidentiary Rulings

Rulings on *in limine* motions "are not final appealable orders under 28 U.S.C. § 1291."[6] Thus, in order to appeal an issue on which the district court ruled *in limine,* a party must receive a final ruling on the issue. For example, if a party wishes to appeal the exclusion of evidence on which a court tentatively ruled *in limine,* the party must attempt to introduce the evidence at trial, giving the district court the opportunity to issue a final, appealable order.[7] Cole did not attempt to introduce evidence of prior similar claims at trial because he had voluntarily dismissed his negligence claim after the court's *in limine* order. Accordingly, the district court never issued a final exclusionary order and we lack jurisdiction to review the issue. Similarly, the district court never issued a final order regarding the proper measure of damages because Cole did not receive a favorable verdict. Thus, we may not review that question and dismiss the appeal as to it.

We also may not review the district court's decision to allow evidence that Cuprum had complied with OSHA and

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[4] *Safeway Stores v. Fannan,* 308 F.2d 94, 97 (9th Cir. 1962).

[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

[6] *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1342, *as corrected by* 773 F.2d 1049 (9th Cir. 1985).

[7] *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 689 (9th Cir. 2001).

ANSI standards. A party "who preemptively introduces evidence ... may not on appeal claim that the admission of such evidence was error."[8] Cole introduced evidence of the standards, presumably as part of a strategy to take the "sting" out of the evidence. Accordingly, we may not review this question and dismiss the appeal as to it.

We may review the district court's exclusion of the proffered testimony of plaintiff's expert, David Paul, because the court finalized its decision during plaintiff's presentation of his case. The district court was well within its discretion[9] in excluding Mr. Paul's testimony. Both Cole and Cuprum had designated experts who were, or who would have been, able to testify regarding the subjects of Mr. Paul's testimony. Accordingly, we affirm the district court's decision.

For the foregoing reasons, we reverse and remand in part, dismiss in part, and affirm in part.

REVERSED AND REMANDED IN PART; DISMISSED IN PART; AFFIRMED IN PART.

No costs allowed.

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[8] *Ohler v. United States*, 529 U.S. 753, 760, (2000).

[9] *See Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (setting forth the standard of review).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PAUL COLE, Plaintiff, v. BUILDERS SQUARE, a Delaware corporation,and CUPRUM, S.A., de C.V., Defendants.	CV-99-729-ST FINDINGS AND RECOMMENDATION

[Filed: November 9, 2000]

STEWART, Magistrate Judge:

INTRODUCTION

Plaintiff, Paul Cole ("Cole"), originally filed this action in Multnomah County Circuit Court (Case No. 9904-04724) against defendants, Builders Square, and Cuprum, S.A. de C.V. ("Cuprum"), seeking to recover for injuries he suffered when he fell from a ladder manufactured by Cuprum and sold by Builders Square. Builders Square filed its Notice of Removal to this court on May 20, 1999.

Cole is a resident of Oregon; Builders Square is a Delaware corporation, with its principal place of business outside of Oregon; Cuprum is a Mexican corporation, with its principal place of business outside of Oregon; and the amount

in controversy exceeds $75,000. Thus, this court has diversity jurisdiction pursuant to 28 USC § 1332.

Cole's Complaint alleges a products liability action against each defendant, seeking recovery for non-economic damages, past and future medical expenses, and past and future earnings. Due to its filing for bankruptcy, this case was stayed as to Builders Square. On July 28, 2000, Cole filed an Amended Complaint, deleting his claim against Builders Square and adding a $10 million claim for punitive damages against Cuprum. By Opinion and Order dated September 20, 2000, this court struck Cole's Amended Complaint with leave to replead for failure to comply with Federal Rule of Civil Procedure ("FRCP") 15, but rejected as premature Cuprum's alternative argument that amending the Complaint to add a punitive damages claim would be futile.

On September 26, 2000, Cole filed an Amended Complaint that included once again a claim against Cuprum for punitive damages. Cuprum's Motion for Summary Judgment (docket #53) against the punitive damages claim is now before the court. For the reasons stated below, that motion should be granted.

STANDARDS

Federal Rule of Civil Procedure ("FRCP") 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 US 317, 323 (1986). Once the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Id* at 324. A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of Am. v.*

Phelps Dodge Corp., 865 F2d 1539, 1542 (9th Cir), *cert denied*, 493 US 809 (1989).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F2d 626, 630 (9th Cir 1987). The court must view the inferences drawn from the facts in the light most favorable to the non-moving party. Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id* at 630-31. However, when the non-moving party's claims are factually implausible, that party must come forward with more persuasive evidence than would otherwise be required. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics Inc.*, 818 F2d 1466, 1470 (9th Cir 1987), *cert denied*, 484 US 1006 (1988). The Ninth Circuit has stated, "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Id* at 1468.

FACTS

A review of the parties' facts, as well as the other materials submitted by the parties, including affidavits and deposition excerpts, reveals the following:[10]

In 1993, Cole's friend, Donald Worthington, purchased at Builders Square a 28-foot fiberglass extension ladder manufactured by Cuprum ("the model 534"). Amended Complaint, ¶ 3. Cuprum manufactured this ladder in December 1992. Cuprum's Supplemental Concise Statement of Material Facts, ¶ 1.

On July 3, 1998, Cole set up this ladder in front of a friend's house, and while an assistant adjusted the ladder from

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[10] All depositions are referred to by the deponents last name, followed by the page of the deposition transcript.

the ground, Cole adjusted the ladder from the roof. Cuprum's Amended Concise Statement of Material Facts, ¶¶ 1-2. Cole explained that from his position on the roof, the ladder appeared "perfectly normal:"

Q: So you didn't see the rung lock sticking out —
A: No.
Q: — in a way that looked unusual to you?
A: No.
Q: Everything looked perfectly -
A: Normal, as far as I could tell.
Q: Okay. So that's your own observation, your own eyes. How much time did you spend looking at the ladder before you asked [the assistant] how it looked?
A: Few seconds.
Q: Then you asked [the assistant]. What words did you use?
A: Exact words, I'm not sure. I asked him if it looked — if it was locked. He said, it looks good from down — you know, paraphrasing. I don't know exactly the words he said, but, you know, he indicated that it looked okay.

Cooke Depo, pp. 90-91.

When Cole began to climb down from the roof and placed his weight on the ladder, the ladder telescoped downwards. Cuprum's Amended Concise Statement of Material Facts, ¶ 3. Cole fell from the ladder and was severely injured. *Id.*

Cuprum began manufacturing the model 534 extension ladder in November 1989 and has since manufactured more than 10,000 such ladders. Cole's Response to Cuprum's Amended Concise Statement of Material Facts, ¶ 9. Cole alleges, and Cuprum denies, that the rung locks on the model

534 are defectively designed. *Id*, p. 3, ¶ 1. Specifically, Cole asserts that the model 534 ladder is unreasonably dangerous as designed because "the rung locks have a tendency to hang on the rung giving the appearance that the rung locks are engaged when they are not and then when a user climbs the extension section of the ladder it telescopes downward." Amended Complaint, ¶ 4.

The rung locks, when properly engaged, surround both the rung of the fly section and the base section. Cole's Response to Cuprum's Amended Concise Statement of Material Facts, ¶ 2. Cuprum readily admits that if a ladder's rung locks are mislocked, then it would be dangerous to climb. *Id*, ¶ 21. The 534 model bears two warning labels instructing the user to ensure the rung locks are set before using, a warning label instructing the user not to adjust the ladder from above, and a warning label that the user could die if the instructions are not followed. Cuprum's Amended Concise Statement of Material Facts, ¶¶ 8-10.

Ed Cooke ("Cooke") has been designated by Cuprum to handle all of their product liability litigation for the past 16 years. Affidavit of Ed Cooke ("Cooke Aff"), ¶ 1. As part of his duties, he tracks information about claims and law suits made against Cuprum. *Id.* He has identified and produced information concerning a total of seven claims and seven law suits involving the model 534 ladder. *Id*, ¶ 5. These include allegations involving any ladder component or feature, not just the rung locks. *Id.*

DISCUSSION

Cuprum's motion now seeks summary judgment solely against Cole's claim for punitive damages because Cole has not produced sufficient evidence for a jury to reasonably award such damages.

I. Legal Standard

In Oregon, a product liability civil action is:

> a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of: (1) Any design, inspection, testing, manufacturing or other defect in a product; (2) Any failure to warn regarding a product; or (3) Any failure to properly instruct in the use of a product.

ORS 30.900.

Plaintiffs may be entitled to an award of punitive damages in such cases. *See* ORS 30.925.[11] "The substantive criteria to considered by an Oregon factfinder in deciding whether to make an award of punitive damages in a product liability action and, if so, in setting the award, are set out in ORS 30.925." *Oberg v. Honda Motor Co., Ltd.*, 320 Or 544, 552, 888 P2d 8, 12 (1995). ORS 30.925 establishes a two-part test for such damages. The first part requires that "in a product liability civil action, punitive damages shall not be recoverable except as provided in ORS 18.537." ORS 30.925(1). ORS 18.537, enacted in 1995, provides in relevant part that:

> Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless

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[11] ORS 30.925 was amended in 1995. The amendments apply only to actions commenced on or after their effective date, which was September 9, 1995. Because Cole commenced this action in 1999, the current statute applies.

> and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

ORS 18.537(1).

ORS 30.925 sets forth the following criteria in determining and awarding punitive damages:

> (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
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> (b) The degree of the defendant's awareness of that likelihood;
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> (c) The profitability of the defendant's misconduct;
>
> (d) The duration of the defendant's misconduct and any concealment of it;
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> (e) The attitude and conduct of the defendant upon discovery of the misconduct;
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> (f) The financial condition of the defendant; and
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> (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

ORS 30.925(2).

II. Analysis

A. ORS 18.537(1)

Cole asserts that he is entitled to seek punitive damages because he has presented sufficient evidence that a jury could reasonably find, by clear and convincing evidence, that Cuprum

acted with a "reckless and outrageous indifference to a highly unreasonable risk of harm" and "a conscious indifference to the health, safety and welfare of others."[12] ORS 18.537(1). Specifically, his claim for punitive damages alleges that "Cuprum's failure to warn the public about the tendency of the rung locks to hang on the rung giving the appearance that the rung locks are engaged when they are not was a serious compromise of safety and placed the consumers unnecessarily at great risk of serious injury." Amended Complaint, ¶ 13.

1. Defective Design

Cuprum first argues that the model 534 is not defective because its design, including the rung locks, was approved by two independent testing groups, Underwriter's Laboratories, Inc. ("Underwriters") and ANSI A 14.5 1992 - American Requirements ("ANSI"). Defendant's Amended Concise Statement of Material Facts, ¶¶ 6-7. In addition, Cuprum argues that because more than 10,700 of these ladders have been sold since 1988 and only 14 complaints, including Cole's, have been made, the design must be safe. Finally, Cuprum argues that Cole would not have been injured had he followed the warnings on the ladder.

Cole, however, presents evidence attacking the utility of the Underwriters and ANSI testing procedures, given the alleged defect in this case. One of his experts, David Paul, states that "Cuprum's assertion the Model 534-28 extension ladder passed the ANSI 14.5 and [Underwriters] tests for portable ladders has no bearing on whether the subject rung

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[12] The statute clearly allows a plaintiff to assert either that a defendant acted "with malice" *or* that a defendant acted with "a reckless and outrageous indifference to a highly unreasonable risk of harm." ORS 18.537(1). Cole proceeds under the second option and does not argue that Cuprum acted with malice.

locks are defectively designed because of their tendency to false lock as a result of friction." Affidavit of David Paul, ¶ 2.

Cole also presents the unequivocal opinions of three experts that the rung lock on the model 534 was defectively designed. Affidavit of Michael H. Bloom, Exhibit ("Ex") A, pp 1-9. For example, one of Cole's experts states bluntly that "[t]he Cuprum model 534-28 ladder used by Paul Cole on July 3, 1998 was defectively designed. The design defect involves the design of the rung locks or hooks used on the ladder." *Id*, p. 1. Lastly, any arguments concerning the warnings on the ladder are clearly related only to causation or comparative fault, and are not persuasive evidence that the rung locks were or were not defectively designed. Thus, at a minimum, Cole has created a fact issue on the question of whether the model 534 rung locks were defectively designed.

2. <u>Notice of Defect</u>

Second, Cuprum argues that it cannot be liable for punitive damages because it had insufficient notice of any design defect in the rung locks before it designed, manufactured, or sold the model 534 ladder. A defendant who manufactures or sells a product which he knows or should know is dangerous demonstrates the type of behavior that punitive damages are intended to deter. Similarly, a defendant in a product liability action who fails to warn of a known danger may be liable for punitive damages. As the Oregon Supreme Court has stated, "[p]unitive damages . . . are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard or indifference *to known or highly probable risks to others*." *Andor v. United Air Lines, Inc.*, 303 Or 505, 517, 739 P2d 18, 25 (1987) (emphasis added).

On the other hand, a defendant who does not and should not reasonably know that his product is dangerous does not exhibit the sort of behavior that punitive damages are designed

to punish and deter. ORS 18.537(1) clearly allows punitive damages only if the defendant knows, or reasonably should know, that his product creates a "highly unreasonable risk of harm" to others. Only then can a defendant be found guilty of a reckless and outrageous indifference and a conscious indifference to the health, safety and welfare of others. Simply put, once a plaintiff demonstrates that a defendant knew, or should have known, that his product is dangerous, he then must demonstrate that the defendant exhibited "reckless and outrageous indifference" and "conscious indifference." *See* ORS 18.537(1).

Oregon courts have universally recognized that a defendant cannot be liable for punitive damages in product liability civil claims unless it knows or should know that its product is dangerous. In *Axen v. American Home Products Corp.*, 158 Or App 292, 974 P2d 224 (1999), the injured plaintiff alleged that the defendant had intentionally failed to warn consumers that its product could cause permanent vision loss. The Oregon Court of Appeals determined under the former ORS 30.952 (which required"wanton misconduct") that "[f]or purposes of determining punitive damages, wanton misconduct is that which creates a substantial risk of harm to another and is purposefully performed *with an awareness of the risk* and a disregard of the consequences." *Id* at 312, 974 P2d at 238 (emphasis added). The court concluded that there was more than enough evidence for the jury to have found by clear and convincing evidence that the defendant:

> knew of the association between amiodarone use and optic neuropathy; that optic neuritis and optic neuropathy were not interchangeable diagnoses; that optic neuropathy could cause permanent vision loss; and that [the defendant] made a conscious choice not to warn of optic neuropathy. Moreover, there is evidence from which the jury could have concluded

> that [the defendant's] choice not to warn of optic neuropathy was driven, at least in part, by financial concerns related to its ability to market the product. Hence, there was sufficient evidence to permit the jury to conclude, by clear and convincing evidence, that [the defendant] had acted with extraordinary disregard of or indifference to known or highly probably risks to others. Accordingly, there was sufficient evidence under former ORS 30.925 to present the case for punitive damages to the jury.

Id at 312-13, 974 P2d at 238.

In *Lakin v. Senco Products, Inc.*, 144 Or App 52, 72, 925 P2d 107, 119 (1996), the plaintiff sued a pneumatic nail gun manufacturer for his injuries suffered from a nail gun accident. The Court of Appeals found that "the record discloses clear and convincing evidence sufficient to establish plaintiffs' entitlement to some award of punitive damages." *Id.* In particular, the court explained that:

> reasonable jurors could find that the following propositions were "highly probable": (1) Defendant had long been aware of the tendency of its nail guns to double fire. Nevertheless, it conducted no tests to determine when, or how frequently, double firing occurred, or the extent of injury that could result from double firing. (2) If defendant had undertaken tests relating to the [nail gun's] propensity to double fire, it would have known of the gun's potential to seriously injure users and could have changed its warnings or the design of the gun accordingly. We note, particularly, that defendant's own expert testified that defendant did not test its "safety warning" regarding double firing to ensure that the warning accurately instructed users regarding the appropriate means of

> avoiding double firing. Moreover, plaintiffs' experts testified that, in their testing of the [nail gun], they not only found that double firing occurred frequently, but also found that the recoil effects included the same type of inadvertent "bump fire" actuation that occurred with John Lakin. (3) Both the [nail gun's] design and its warnings could reasonably and practicably have been modified to make the gun's use safer . . . . Moreover, although defendant had manufactured a "restrictive trigger" modification of the [nail gun] that would eliminate the gun's ability to double fire, it did little to appraise users of the restrictive trigger or its safety purpose. In particular, although the "tool use" section of the [nail gun's] manual noted that the restrictive trigger was useful when place firing, the manual did not inform consumers that the restrictive trigger would protect against the danger of double fire. (4) Defendant's failure to effectively address the [nail gun's] double firing problem was conscious

Id at 72-73, 925 P2d at 119-20.

Therefore, whether Cuprum may be liable for punitive damages rests to a large extent on whether Cuprum knew or should have known of problems with the model 534 rung locks. As evidence that Cuprum possessed the requisite mental state, Cole relies on three lawsuits against Cuprum: *Bazan v. Cuprum, S.A., De C.V., et al*, Harris County District Court Cause No. 96-32221 (Texas 1996); *Jehnsen et al v. Builder's Square, Inc., et al*, Bay County Circuit Court Case No. 96-3148-NP-B (Michigan 1996); and *Watkins, et al v. Cuprum International, Inc., et al*, Brazos County District Court Cause No. 36.987-85 (Texas 1992). Affidavit of Michael H. Bloom ("Bloom Aff"), Ex A, pp. 29-34. He argues that by virtue of these three lawsuits, Cuprum knew of a dangerous defect in the

model 534 locking rungs, but has done nothing to protect the public.[13]

Cuprum responds that two of these three lawsuits are inadmissible because they arose after the ladder in question left Cuprum's control; the third lawsuit is too dissimilar to have provided notice of any design flaw in the rung locks; and that even if admissible, the three lawsuits are insufficient to support a claim for punitive damages.

a. Timing of the lawsuits

Two of the cases cited by Cole, *Bazan* and *Jehnsen*, were filed in 1996, well after the rung locks in this case were designed (in 1989), the ladder manufactured (in December 1992), and sold (sometime in 1993). Therefore, Cuprum argues that the lawsuits cannot be admitted to show that Cuprum had notice of a rung lock defect when it designed, manufactured, or sold the model 534 ladder. Cuprum's argument is well taken. These two lawsuits cannot be used to demonstrate knowledge of a defect at the time the model 534 at issue in this case was designed, manufactured, or sold. Had Cole sought to introduce these lawsuits to buttress a traditional failure to warn products liability claim, then, naturally, these lawsuits would be irrelevant.[14] However, Cole seeks to introduce these lawsuits

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[13] Q: What precautions does Cuprum take to ensure that the rung locks do not hang up in a mislocked position?
A: I don't know of any they can take.

Cooke Depo, p. 74.

[14] The lawsuits might be relevant, however, if Cole alleged a "post-sale" failure to warn products liability action. *See* Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV 7, 17 (1999) (explaining that warnings that were or should have been given when a product is sold are

in support of a punitive damages claim as evidence of a continuing course of deliberate indifference to a known danger. As such, these lawsuits are relevant evidence and admissible.

The legal standard in Oregon applicable to post-verdict judicial review of a jury's award of punitive damages asks "Was the award of punitive damages within the range that a rational juror would be entitled to award in the light of the record as a whole?" *Oberg*, 320 Or at 551, 888 P2d at 12.

"The range that a rational juror is entitled to award depends, in turn, on the statutory and common law factors that the jury is instructed and permitted to consider when awarding punitive damages for a given claim." *Id.* These factors expressly contemplate the review of evidence of misconduct arising after the design, manufacture, or sale of a product. *See e.g.*, ORS 30.925(3)(d) & (e) (factors include "[t]he duration of the misconduct and any concealment of it" and "the attitude and conduct of the defendant upon discovery of the misconduct"); *see also Oberg*, 320 Or at 544, 888 P2d at 13 ("There was evidence that, when plaintiff's injury occurred, defendants had notice . . . that numerous injuries were occurring").

Cuprum argues that this court has in the past excluded evidence of post-manufacture defects when discussing punitive damages in a product liability action, citing *Knight v. Just Born, Inc.*, Civil Number 99-606-ST, Findings & Recommendations by Judge Stewart dated March 28, 2000,

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referred to as "point of sale" warnings and "post-sale" warnings refer to warnings allegedly required where a manufacturer does not know or have reason to know of a hazard at the time a product is sold, but discovers the hazard sometime later). The Oregon Supreme Court, however, has declined to express an opinion as to whether a continuing failure to warn claim states a cause of action "independent of the statutory product liability claim." *Sealey v. Hicks*, 309 Or 387, 399 n14, 788 P2d 435, 441 n14 (1990).

docket #32, adopted by Order of Judge King dated July 6, 2000, docket #39. In *Knight*, however, this court did not expressly exclude any of plaintiff's evidence but instead merely acknowledged that the plaintiff's claim for punitive damages "was based on the fact that between October 1994 and April 1998, Just Born received six complaints from other consumers about Hot Tamales that were, in essence, too hot." *Id* at 27. The candy at issue in that case was manufactured in May 1998. *Id* at 9. Plaintiff submitted no post-manufacture complaints. This court found summary judgment appropriate against the plaintiff's punitive damages claim because "the prior complaints are neither similar enough nor severe enough to justify a punitive damages award." *Id* at 27.

In another case decided by this court, *Van Westrienen v. Americontinental Collection Corp.*, Civil Number 99-819-ST, Opinion by Judge Stewart dated April 12, 2000, and cited by Cuprum, this court denied the defendants' summary judgment motion against the plaintiffs' punitive damages claim, stating:

> As discussed above, plaintiffs denied viewing the website in their depositions, but Kenneth Van Westrienen asserts that he viewed the website prior to filing the lawsuit. Whether he viewed the website before or after filing the lawsuit is irrelevant to a discussion of punitive damages, however. Punitive damages are primarily intended to "punish a wilful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future." *Friendship Auto v. Bank of Willamette*, 300 Or 522, 532, 716 P2d 715, 718 (1986). As such, the website is relevant to a determination of whether defendants' conduct was so egregious as to merit an award of punitive damages.

Id at 31.

The fact that the same alleged design defect in the rung locks of the model 534 ladder continues to cause injuries is relevant to establishing the dangerousness of the product and Cuprum's knowledge of that dangerous condition. These two lawsuits from 1996 may be critical to a jury's determination of whether Cuprum, in making and continuing to market the model 534 ladder, engaged in conduct that was "culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probably risks to others." *Andor*, 303 Or at 517, 739 P2d at 25. Accordingly, *Bazan* and *Jehnsen* are admissible to support Cole's punitive damages claim.

b. Similarity of the lawsuits

Next, Cuprum argues in vain that *Watkins* is inadmissible because Cole has failed to demonstrate its similarity to the present action. Rather, Cole has demonstrated that all three of the lawsuits are similar enough to be admitted as evidence.

To lay a foundation for the admission of evidence of other accidents to prove a design defect, or notice of a defect, the party must demonstrate that there is a substantial similarity between the products in question. *Cooper v. Firestone Tire & Rubber Co.*, 945 F2d 1103, 1105 (9th Cir 1991). Evidence regarding similar accidents is relevant under Rules 401 and 402 of the Federal Rules of Evidence. *Id.* "The rule rests on the concern that evidence of dissimilar accidents lacks the relevance required for admissibility under Federal Rules of Evidence 401 and 402." *Id.* The similarity standard is relaxed when the prior incidents are admitted to prove notice rather than to show the existence of a dangerous condition. *Pau v. Yosemite Park and Curry Co.*, 928 F2d 880, 889 (9th Cir 1991); *see also Waddill v. Anchor Hocking, Inc.*, 149 Or App 464, 468, 944 P2d 957, 960 (1997), *rev'd on other grounds*, 330 Or 376, 8 P3d 200 (2000) (noting that evidence of prior incidents

in product liability action was admissible "assuming that there is evidence that the manufacture of the fishbowls by the defendant and the particular uses were substantially similar to the manufacture and use of the fishbowl in this case").

Cole has submitted only the first page of the complaint in *Watkins* which evidences a lawsuit filed against Cuprum, but little else. Bloom Aff, Ex A, p. 29. It is even unclear whether *Watkins* concerns an accident involving a ladder. Cooke, however, remembered a few details about this lawsuit when he was shown the complaint in his deposition:

> Q: I [am] going to present you with Exhibit 9. That is a complaint of a lawsuit, *Watkins versus Cuprum*, one of the claims that you provided us with.
> A: That's not a telescoping case. That was an allegation, but it was proved that it was not a telescoping case.
> Q: There was an allegation that the ladder was mislocking, but you say it was proved otherwise?
> A: Yes. And we got a defendant's verdict in the case.
> Q: In that particular case, though, there was an allegation that the 534 was mislocking?
> A: That was his allegation.
> Q: And that particular complaint arose from an injury in April of 1991, correct?
> A: Oh, I don't remember.

Cooke Depo, p. 89.

Evidently, by Cooke's own testimony, *Watkins* concerns allegations of mis-locking with the rung locks of the model 534 extension ladder. It is true, as Cuprum points out, that Cole has not presented any factual details surrounding the *Watkins* incident, and *Watkins* may involve different factual

circumstances or legal claims. Yet the test here is one of "substantial similarity," not exactness. Under that standard, *Watkins* is admissible as evidence that Cuprum had notice of a potential problem with the model 534 rung locks.

Bazan and *Jehnsen* are also similar enough to be admissible into evidence. The *Bazan* complaint alleges that the plaintiff's injuries were caused by a defective rung lock: "Bazan was installing cable while using [the model 534 extension ladder] . . . when the latching mechanism of the ladder failed to operate as it was intended, the fiberglass extension ladder collapsed, which caused Plaintiff to fall to the ground." Bloom Aff, Ex A, p. 31. Likewise, the *Jehnsen* complaint alleges a faulty rung lock on a model 534 extension ladder: "As Gerald L. Jehnsen was standing with both feet on one of the rungs and his hands on the rails, the ladder suddenly collapsed." *Id*, p. 33. The *Jehnsen* complaint also alleges that Cuprum "knew . . . or should have known that the failure of the fly-lock to engage or lock and/or the occurrence of a 'false-lock' situation, where the fly lock does not properly engage the base rungs, could cause the fly-lock to slip out from the base rung, causing the ladder to slip." *Id,* p. 34.

c. <u>Sufficient evidence</u>

Lastly, Cuprum argues that even if these three lawsuits, *Bazan*, *Jehnsen*, and *Watkins*, areadmissible evidence to prove Cole's punitive damages, they are insufficient as a matter of law. Its argument is well taken.

First, *Watkins* resulted in a jury verdict for Cuprum. Cooke's testimony reveals his corresponding reasonable belief that the jury had completely rejected the plaintiff's allegation that the ladder had mis-locked. *See* Cooke Depo, p. 89 ("it was proved that it was not a telescoping case"). Thus, absent any contrary evidence, Cole cannot rely on *Watkins* to show that Cuprum had notice of a design defect in the rung locks of the

model 534 ladder.

Second, even if Cuprum had some notice of a potential problem with its rung locks, the model 534 passed the ANSI and Underwriters standards. These standards may not ultimately determine that the rung locks on the model 534 were safely designed, but they do show that Cuprum intended and attempted to design a safe ladder. *See e.g., Silkwood v. Kerr-McGee Corp.*, 485 F Supp 566, 583-84 (WD Okla 1979) (concluding that substantial compliance with regulatory scheme did not bar award of punitive damages, but noting that "[g]ood faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages" under state law). Even if Cuprum had knowledge of several lawsuits alleging a defect, its successful adherence to safety standards should have provided reasonable reassurance that it was complying with industry standards.

Third, the two lawsuits filed in 1996, *Bazan* and *Jehnsen*, though factually very similar to the present suit, provide little hard evidence of culpable conduct. A lawsuit is merely a claim which may or may not have merit. This court has no information as to the outcome in those cases. Did the case go to trial, and, if so, who won? Did Cuprum believe that the lawsuits were meritless, yet settle them to avoid the difficulties and expense of litigation? Without more, this court is hard-pressed to consider the two lawsuits as evidence of Cuprum's knowledge of a defect.

Lastly, Cole has presented evidence of only three lawsuits filed while Cuprum reports that it manufactured over 10,000 model 534 extension ladders between 1989 and 1998. Given the large number of ladders manufactured and the small number of claims filed alleging a defect with the rung locks, this court is further convinced that no reasonable jury would

find that Cuprum acted, or failed to act, with the requisite knowledge. This court similarly noted in *Knight* that six complaints in four years concerning a product "presumably consumed by millions of people" was simply not enough evidence to create a jury question. *Knight*, p. 27.

Cole has argued that Cuprum's record-keeping is poor and has hinted that there may be many more claims and lawsuits against the model 534 ladder not yet discovered. A defendant may not escape the threat of punitive damages by concealing evidence that it knew of a product defect. ORS 30.925 makes this strategy extremely unwise, given that the factors delineated in ORS 30.925(2) include the degree of the defendant's awareness, the profitability of the defendant's misconduct, the duration of the defendant's misconduct and any concealment of it, and the attitude and conduct of the defendant upon discovery of the misconduct.

Cooke disclosed that prior to this case he was aware of other claims of mislocking rung locks on the model 534:

Q: Mr. Cooke, the 534 fiberglass ladder with — the same model that Mr. Cole was using, has been the subject of claims for mislocking, hasn't it?
A: Claims for what?
Q: Mislocking.
A: Sure.
Q: And as you said, those claims cross your desk, and you provided us with them.
A: Right.
Q: Can you recall when you first were aware of the first allegation that ladder mislocked?
A: That model of ladder or of a mislock?
Q: The 534
A: I have no concept.

Cooke Depo, pp. 88-89.

However, Cooke further explains that "[a]fter a claim or complaint is resolved, dismissed, or otherwise becomes inactive, the file is closed and purged per Cuprum retention policy." Cooke Aff, ¶ 3. "The information retained after purging claims files is limited to the claimant's name, ladder information, the Plaintiff's attorney's name and other accident information when available." *Id*, ¶ 4. Cooke produced to Cole's counsel all of the information he had concerning claims and lawsuits involving the model 534 ladder, even claims and lawsuits that did not involve the rung locks. *Id*, ¶ 5. Out of those seven claims and seven lawsuits identified by Cooke, Cole has provided evidence only of the three lawsuits discussed above. Presumably, the other 11 claims and lawsuits have nothing to do with the rung locks.

Thus, while Cuprum's record-keeping is somewhat sketchy, it does retain the most important information concerning claims and apparently did comply with Cole's requests for production. Thus, Cole has not presented the court with any evidence that Cuprum deliberately intended to shield itself by creating an artifice of ignorance.

In other cases involving ORS 30.275, successful plaintiffs are able to point to a great deal of evidence concerning the defendant's knowledge of, and disregard for, a defective or dangerous product. For example, in *Oberg*, the plaintiff credibly demonstrated that the defendants had known that their product was defective for over 15 years. *See Oberg*, 320 Or at 554-555, 888 P2d at 13. In *Lakin*, the plaintiff likewise demonstrated that the defendant had notice of dozens of incidents in which consumers had been injured as a result of the same defect that injured the plaintiff. *Lakin*, 144 Or App at 63, 925 P2d at 114.

Here, however, Cole has failed to present such evidence that a reasonable jury could conclude that Cuprum knew or

should have known of a danger in its product and continued nevertheless to design, produce, and sell it.

B. Conclusion

ORS 18.537(1) requires proof by clear and convincing evidence. Evidence is "clear and convincing" when "the truth of the facts asserted is highly probable." *In re Conduct of Blaylock*, 328 Or 409, 411, 978 P2d 381, 381-82 (1999). However, "[i]t is not our job to decide whether the evidence is clear and convincing, but to decide whether a jury could find that it is." *Onita Pacific Corp. v. Trustees of Bronson*, 122 Or App 452, 457, 858 P2d 453, 453 (1993).

Here, no reasonable jury could find that Cuprum has had notice, or should have had notice, of any defect in the rung lock mechanism of the model 534 extension ladder. Therefore, this court concludes that a reasonable jury could not determine by clear and convincing evidence that Cuprum acted with the requisite "reckless and outrageous indifference to a highly unreasonable risk of harm" and "conscious indifference to the health, safety and welfare of others" to satisfy ORS 18.537.

RECOMMENDATION

For the reasons stated above, Cuprum's Motion for Summary Judgment (docket #53) should be GRANTED.

SCHEDULING ORDER

Objections to the Findings and Recommendation, if any, are due November 27, 2000. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than December 14, 2000. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under

advisement.

DATED this 8th day of November, 2000.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PAUL COLE, Plaintiff, v. BUILDERS SQUARE, a Delaware corporation, and CUPRUM, S.A., de C.V., Defendants.	CV-99-729-ST ORDER

[Filed: January 9, 2001]

Magistrate Judge Janice M. Stewart filed her findings and Recommendation on November 9, 2000. The matter is now before me pursuant to 29 U.S.C. § 636 (b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the magistrate Judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate Judge's report. 29 U.S.C. § 636 (b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F. 2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has filed timely objections. I have, therefore, given the file of this case a de novo review. To the extent the Findings and Recommendation holds otherwise, the court affirms that the standard under ORS 18.537(1) is that plaintiff

must prove "by clear and convincing evidence that [defendant] has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." With that comment, I ADOPT Magistrate Judge Stewart's Findings and Recommendation. Cuprum's Motion for Summary Judgement (docket #53) is granted.

IT IS SO ORDERED.

DATE this 8th day of January, 2001.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL COLE, Plaintiff-Appellant. v. BUILDERS SQUARE, INC., a Delaware corporation, et al., Defendants-Appellees.	No. 01-35491 D.C. No. CV-99-00729-PA District of Oregon, Portland ORDER

[Filed: November 14, 2002]

Before: GOODWIN, T.G. NELSON and GRABER, Circuit Court Judges.

Appellant's petition for rehearing is DENIED.

APPENDIX E

CONSTITUTIONAL PROVISIONS

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article I §17 of the Oregon Constitution provides:

> In all civil cases the right of Trial by Jury shall remain inviolate.

Amended Article VII §3 of the Oregon Constitution provides:

> In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

APPENDIX F

28 U.S.C. § 2072

The Federal Rules Enabling Act, 28 U.S.C. § 2072, provides:

> § 2072. Rules of procedure and evidence; power to prescribe
>
> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

APPENDIX G

FEDERAL RULE OF CIVIL PROCEDURE 56

Federal Rule of Civil Procedure 56 provides in pertinent part:

RULE 56. SUMMARY JUDGMENT

* * * * *

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone abought there is a genuine issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX H

O.R.S. 18.537

O.R.S.. 18.537 provides in pertinent part:

18.537. Standards for award of punitive damages; required review of award by court; additional reduction of award for remedial measures.

(1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

APPENDIX I

O.R.S. 18.540

O.R.S.. 18.540 provides in pertinent part:

18.540. Distribution of punitive damages; notice to Department of Justice; order of application.

(1) Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

* * * * *

(b) Sixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.